

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of License of)	
)	
BELWEN, INC.)	
)	
Licensee of Multipoint Distribution Service)	
Station WMI297)	
Wilmington, North Carolina)	
)	
Petition for Declaration of)	
Forfeiture of License)	File No. 94-50421
MMDS Station WMI297,)	
Wilmington, North Carolina)	
)	
Petition for Reconsideration of)	
The Grant of the Renewal of License)	File No. BRMD-20010402ABJ
For Multichannel Multipoint Distribution)	
Service Station WMI297)	
Wilmington, North Carolina)	
)	

ORDER ON RECONSIDERATION

Adopted: March 14, 2005

Released: March 15, 2005

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Memorandum Opinion and Order on Reconsideration*, we address a petition filed by Belwen, Inc. (“Belwen”), former licensee of Broadband Radio Service (BRS) Station WMI297, Wilmington, North Carolina (“the Station”), seeking reconsideration of our November 12, 2003, *Memorandum Opinion and Order* declaring Belwen’s license for the Station to be cancelled (“Petition”).¹ For the reasons discussed below, we deny the Petition.

II. BACKGROUND

2. On April 12, 1994, the Commission granted Belwen an operational license for BRS Station WMI297, with an expiration date of May 1, 2001.² Belwen entered into a lease agreement with Microwave Consulting Services, Inc. (MCS), in which Belwen and MCS agreed that MCS would operate and maintain the Station on Belwen’s behalf.³ Belwen claims that since the station was authorized, the

¹ See Belwen, Inc., *Memorandum Opinion and Order*, 18 FCC Rcd 23857 (WTB PSPWD 2003) (*MO&O*).

² See File Nos. 1676-CM-P-83, 50272-CM-MP-93, 1600B1, and 50421-CM-L-94.

³ See Channel Lease Agreement, attached to Letter, dated Nov. 10, 2000, from Wayne E. Wagner, President, Belwen, to Sharon M. Bertelsen, Video Services Division, MMB, FCC (*Response Letter*). Belwen entered into the lease agreement on February 21, 1992, shortly after it filed its application to construct the station, before it obtained its operational license.

station has had one subscriber, MCS,⁴ but acknowledges that neither it nor MCS has signed up any wireless cable customers.⁵

3. Wireless One of North Carolina, L.L.C. (“WONC”) is the Basic Trading Area authorization holder for Wilmington, North Carolina (B478). On August 26, 1996, WONC filed a petition for declaration of license forfeiture against Belwen.⁶ In the WONC Petition, WONC alleges that Belwen did not construct its station and place it into operation before the expiration of the construction period authorized by the Commission, and it did not operate its station on a permanent basis through the license term.⁷ Because of this failure, WONC essentially contends, Section 21.44 of the Commission’s Rules⁸ requires automatic forfeiture of the station license.⁹ On September 12, 2000, WONC supplemented its Petition with a declaration by an engineer indicating that he was unable to detect a signal on July 17, 2000 and August 30, 2000 at the transmitter site for Station WMI297.¹⁰

4. In support of its argument, WONC primarily relies upon a June 16, 1996 field investigation of Station WMI297’s licensed site and electronic monitoring of the station’s assigned channels by its director of engineering. WONC notes that in a declaration, its director of engineering indicated that he conducted a survey of the area and facilities in the vicinity of geographical coordinates indicated on the license of Station WMI297 and found no MDS/MMDS antennas installed at the site or on any of the surrounding towers.¹¹ WONC states that, using frequency monitoring equipment, its director “listened” to the channels assigned to Station WMI297 and detected no signals, transmissions, or activity.¹² WONC also relies upon a statement, dated June 18, 1996, by the manager of Wilmington Marine Center (WMC). In the statement, the WMC manager states that to the “best of his knowledge,” there are no wireless cable signal transmissions emanating from the station’s tower.¹³ WONC also relies on the engineer’s

⁴ See Annual Reports.

⁵ The *Response Letter* responded to a letter dated October 12, 2000 from Sharon M. Bertelsen, Mass Media Bureau, to Wayne E. Wagner, President of Belwen, inquiring into the operational history of Station WMI297 (*Inquiry Letter*). Question 4 of the *Inquiry Letter* asked as follows: “Provide the total number of separate subscribers receiving service each year . . . and provide the total number of customers receiving service, from 1994 to the present.” Belwen responded: “We have had a single subscriber since 1994. The subscriber is the party to whom Belwen leased the channels. . . . To the best of our knowledge, that lessee has not had wireless cable customers. Once Wireless One, Inc. had filed its Petition for Declaration for License Forfeiture in 1996, it was feared that the system could not be further developed because of the risk that the license might be in jeopardy.” Moreover, Belwen claimed in its Annual Report for 2001 and Annual Report for 2002 that it had one subscriber, but also showed in the same one-page reports zero hours of service transmission. See Belwen, Inc. Annual Report Pursuant to Paragraph 21.911 Wilmington, NC – E1-4 Station WMI-297 (Annual Report for 2001 filed March 4, 2002); Belwen, Inc. FRN#0005-0176-29 Annual Report Pursuant to Paragraph 21.911 Wilmington, NC – E1-4 Station WMI-297 (Annual Report for 2002 filed Feb. 20, 2003).

⁶ See WONC Petition for Declaration of License Forfeiture (filed Aug. 26, 1996) (“WONC Petition”). Belwen filed an opposition on Oct. 8, 1996, to which WONC replied on Oct. 25, 1996. On Sep. 12, 2000 WONC filed a supplement to its Petition, to which Belwen responded on Oct. 13, 2000. On Nov. 20, 2001, WONC filed a second supplement to its Petition. On Dec. 12, 2001 Belwen filed an opposition to the second supplement. On Dec. 21, 2001, WONC filed a reply.

⁷ See Petition at 1, 3.

⁸ 47 C.F.R. § 21.44.

⁹ Petition at 1, 3.

¹⁰ See Supplement to Petition.

¹¹ *Id.* at 4.

¹² *Id.*

¹³ *Id.* citing Petition Exhibit 4.

declaration indicating that on July 17, 2000 and on August 30, 2000, it performed an MMDS spectrum scan on the transmitter site for Station WMI297 and was unable to detect a signal.¹⁴ WONC argues that the evidence shows that Belwen either failed to construct the station altogether or constructed the station only temporarily and has since permanently discontinued service.¹⁵ Consequently, WONC argues, pursuant to Section 21.44(a)(3) of the Commission's Rules,¹⁶ the station license was automatically forfeited.¹⁷

5. Belwen, in essence, responded that it constructed its facility in accordance with the terms of its license, and that WONC's claims of non-operation are unfounded.¹⁸ Belwen indicated that Section 21.44(a)(3) applies only to "voluntary" removal or alteration of facilities, and if service was interrupted as WONC contends, it was due to severe weather, and thus, any interruption in service occurred involuntarily.¹⁹ Finally, Belwen argued, in essence, that WONC has acted in bad faith by filing its Petition and that the Commission should investigate WONC's fitness to be a licensee.²⁰

6. On October 12, 2000, the Commission staff sent to Belwen a letter of inquiry,²¹ to which Belwen responded on November 13, 2000.²² On November 28, 2000, WONC filed a letter commenting on Belwen's response.

7. On September 20, 2001, the Commission granted Belwen's renewal application for renewal of its license for Station WMI297.²³ On October 22, 2001, WONC filed a petition for reconsideration of the grant, requesting that the Commission rescind the grant of the Station WMI297 renewal application and that such application be returned to pending status until the Commission acts on the Petition.²⁴

8. On November 12, 2003, the Division granted WONC's Petition for Reconsideration to the extent that we declared that Belwen's license for MMDS Station WMI297 had cancelled.²⁵ In doing so, however, the Division found that WONC had not provided sufficient record evidence to support its contention that Belwen either failed to construct its station altogether or constructed the station only temporarily and had since permanently discontinued service, requiring an automatic forfeiture of the station license pursuant to Section 21.44(a)(d) of the Commission's rules.²⁶ Instead, the Division predicated its ruling on Section 21.303(d), which applies to cases in which "any radio frequency should not be used to render any service as authorized during a consecutive period of twelve months at any time after construction is completed...." In particular, the Division reasoned that Belwen was not providing

¹⁴ Supplement to Petition at 1.

¹⁵ Petition at 4.

¹⁶ 47 C.F.R. § 21.44 (a)(3).

¹⁷ Petition at 5.

¹⁸ Opposition at 1-2.

¹⁹ Response to Supplement at 1-2.

²⁰ Opposition at 1, 5-6.

²¹ Letter, dated Oct. 12, 2000, from Sharon M. Bertelsen, Supervisory Attorney, MDS Section, Video Services Div., Mass Media Bureau, FCC, to Wayne E. Wagner, President, Belwen.

²² *Response Letter, supra.*

²³ File No. BRMD-20010402ABJ.

²⁴ See WONC Petition for Reconsideration (filed Oct. 22, 2001).

²⁵ See *MO&O*.

²⁶ *Id.*, 18 FCC Rcd at 23860 ¶ 10.

“service” within the meaning of Section 21.303(d) because it had only one subscriber.²⁷ A showing of “service,” the Division found, would require that Belwen have “wireless cable customers.”²⁸ On December 15, 2003, Belwen filed its Petition.²⁹

III. DISCUSSION

9. Belwen argues that there are vast numbers of MMDS facilities whose status is or has been identical to that of the Station.³⁰ Belwen argues that, for years, the standard reporting practice for licensees that lease channel capacity to commercial lessees has been to indicate that they have a single subscriber and that the Commission has routinely renewed licenses under those circumstances.³¹ Belwen further argues that, for the past several years, forward movement in the MMDS industry has been stalled by licensee and investor concerns relating to an anticipated FCC restructuring of the MMDS and ITFS services to accommodate Internet access, a service that is best supported by deployment of multiple, two-way cellular base stations operating at relatively low power levels rather than the individual, comparatively high-powered stations that MMDS licensees have used in the past to deliver video signals. Under these circumstances, Belwen argues, it would have been imprudent to make substantial investments in facilities and marketing to develop a form of business that might soon be superseded.³²

10. We reject Belwen’s arguments. Former Section 21.303(d) of the Commission’s Rules stated:

(d) If any radio frequency should not be used to render any service as authorized during a consecutive period of twelve months at any time after construction is completed and a certification of completion of construction has been filed, under circumstances that do not fall within the provisions of paragraph (a), (b) or (c) of this section, or, if removal of equipment or facilities has rendered the station not operational, the licensee shall, within thirty days of the end of such period of nonuse:

(1) Submit for cancellation the station license (or licenses) to the Commission at Washington, DC 20554;

(2) File an application for modification of the license (or licenses) to delete the unused frequency (or frequencies); or

(3) Request waiver of this rule and demonstrate either that the frequency will be used (as evidenced by appropriate requests for service, etc.) within six months of the end of the initial period of nonuse, or that the frequency will be converted to allow rendition of other authorized public services within one year of the end of the initial period of nonuse by the filing of appropriate applications within six months of the end of the period of nonuse.

²⁷ *Id.*, 18 FCC Rcd at 23861 ¶ 13.

²⁸ *Id.*.

²⁹ Petition.

³⁰ *Id.* at 3.

³¹ *Id.*

³² *Id.* at 3-8.

Recently, the Commission affirmed that former Section 21.303(d) of the Commission's Rules required licensees to provide service once within a twelve month period.³³ The Commission also held that, under the plain language of the rule, broadcasting signals that nobody receives did not constitute the provision of service within the meaning of the rule.³⁴ In this case, Belwen admits that the wireless cable system MCS contemplated never had customers. Therefore, it is clear that the Station was never used to provide service within the meaning of former Section 21.303(d). Moreover, it is undisputed that Belwen did not submit a timely request for waiver of the rule. Accordingly, the license for the Station was subject to cancellation.

11. To the extent that Belwen argues that the rule should not have provided for license forfeiture, we decline to consider that argument at this time. As a licensee, Belwen was required to have complied with the rules in effect at the time. The Commission has recently affirmed that, during the period the rule was in effect, applying the rule was in the public interest.³⁵ Belwen's arguments that there are "vast numbers" of other stations similarly situated to Belwen³⁶ is unsupported speculation. Nothing in its Petition indicates that any specific station licensed to another licensee had totally discontinued service to customers. In any event, if Belwen or another party had brought to our attention information demonstrating that a specific license had not been used to provide service for a twelve month period, we would have declared that license forfeited.

IV. CONCLUSION AND ORDERING CLAUSES

12. For the reasons stated above, we conclude that the *MO&O* correctly concluded that the license for Station WMI297 was subject to forfeiture for failure to provide service for a twelve month period. We therefore deny Belwen's Petition and affirm the cancellation of the license for Station WMI297.

13. Accordingly, **IT IS ORDERED** that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 21.44(b) of the Commission's Rules, 47 C.F.R. § 21.44(b), that the Petition for Reconsideration filed by Belwen, Inc. on December 15, 2003 **IS DENIED**.

14. These actions are taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau

³³ San Diego MDS Company, *Memorandum Opinion and Order*, 19 FCC Rcd 23120, 23125 ¶ 11 (2004).

³⁴ *Id.* at 23124 ¶ 10.

³⁵ *Id.*

³⁶ Petition at 3.